BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE T. SOSA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,667
DEFFENBAUGH INDUSTRIES, INC.	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 11, 2011 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical benefits, finding claimant failed to report an accident or provide written claim for compensation until November 9, 2010, which was well outside the statutory time limits set forth in K.S.A. 44-520 and K.S.A. 44-520a, for a January 13, 2010 injury.

The claimant requests the ALJ's Order be reversed because it has been established that he suffered a repetitive injury and is entitled to a finding that his date of injury is the last day worked, November 9, 2010, and that he provided adequate notice and timely written claim under the requirements of the Workers Compensation Act. Therefore, he is entitled to medical benefits.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in June 2008, as a residential driver. At first claimant's job was to drive the truck and after six months he was helping pick up trash in addition to driving the truck.

On January 13, 2010, while claimant was throwing trash into the truck, he lost his footing and slipped on the icy blacktop and landed on his neck.[1] Claimant testified that two people saw him fall, Estevan Rodriguez a co-worker, and the resident of the particular stop they were on at the time. Claimant continued to work after his fall. He testified that after his shift he reported the incident to Joe Gadwood, the superintendent for the residential trash service. Claimant testified he gave Mr. Gadwood a note detailing what had happened and stating that he wanted to continue to work, but was giving notice now so there wouldn't be a problem if he needed medical attention in the future.[2] He didn't realize the severity of his injury at the time and didn't feel he needed medical treatment.

No official accident report was filled out and the claimant did not make a copy of this note. Claimant testified that the note to Mr. Gadwood was necessary because he was concerned about losing his job because of the accident. He felt that, with hard work, he would heal and be okay. However, claimant testified that he continued to get worse as he continued to work. He couldn't move as fast and could barely move by the end of the day. Claimant began to have concerns about his employment, as his condition worsened. He testified that to complain about the job meant you were setting yourself up to be fired.

Claimant sought medical advice from his good friend, Dr. Lawrence Dorman, a chiropractor, two to three months after the accident. Claimant testified that Dr. Dorman told him his back was out of alignment and gave him an adjustment. Dr. Dorman said that claimant would need more treatment. There are no chiropractic documents in this record from Dr. Dorman.

Claimant sought additional treatment, with Dr. Dorman's associate, Dr. Andres on August 8, 2010. Claimant testified that at this time he had tremendous amounts of pain around his neck, his back and his shoulders. The paperwork claimant filled out for this treatment states claimant was injured on December 10, 2009.[3] Claimant identified this as a separate work-related accident. He explained that he first slipped and fell in December 2009, but didn't feel that he was hurt that bad. Claimant didn't report this December 2009 fall to respondent. Claimant on his own obtained chiropractic and acupuncture therapy, which provided only temporary relief. Claimant did not request medical treatment from respondent at that time.

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[1] P.H. Trans. at 8,10.

[2] *Id.* at 11-12.

[3] *Id.* at 17.

By November 9, 2010, claimant could no longer handle the pain and went to Mr. Gadwood to request medical treatment. At the start of his shift, claimant went to see Mr. Gadwood and Robert Hunter, another supervisor, about having the next day of work off so he could see a doctor about his pain. Claimant was directed to the company physician's office, but there was no one there, so claimant went on to work. Claimant stated that on this day he had to work harder than ever because his regular helper was out with an injury and the replacement had just come back from knee surgery, so he wasn't much help.

After his shift, claimant went back to see Mr. Hunter, who suggested that the claimant take two weeks off. Claimant testified that he was leery because he didn't have that much leave time, but he was told to take the time off anyway. Claimant accepted the offer and then while at home, he decided not to take the offer and reported for work the next day only to be told that he wasn't supposed to be there because he had quit the day before. Claimant denied ever saying that he quit and again asked to be sent to a doctor. Claimant's request was denied and security was called to escort him out. Claimant went straight from respondent's business to the VA Hospital because he was having pain in his left shoulder and wrist due to the way security forcefully escorted him out.[4]

Claimant was referred by his attorney to neurologist Francisco Egea, M.D., on December 15, 2010, for a medical examination. Claimant reported suffering injury to his upper thoracic and cervical spines, from carrying large sacks of trash weighing 40-50 pounds and then slipping and falling on a patch of ice on January 13, 2010.

Dr. Egea examined claimant and opined he suffered from cervical traumatic myofascitis, with myofascial pain syndrome, cervical radiculopathy and traumatic myofascitis, with myofascial pain syndrome of the mid-thoracic spine muscles. Dr. Egea stated in his report of December 15, 2010, that claimant's diagnosed conditions were caused by his work-related injury of January 13, 2010.

He recommended an MRI of the cervical spine, physical therapy and medication for pain and muscle spasms. He also assigned restrictions of no frequent bending, twisting, turning, squatting, crawling, kneeling and/or climbing stairs. No lifting or carrying over 25 pounds, no frequent lifting or carrying over 10 pounds an no frequent use of the cervical spine in motion.[5]

Estevan Rodriguez, a residential helper for respondent, testified that he was working with claimant in December 2009 and January 2010, and recalls claimant suffering an injury after trying to handle a trash bin. He doesn't recall when this injury to claimant took place, only that it was in the wintertime of 2010. Mr. Rodriguez did not identify two separate

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[4] *Id.* at 26.

[5] *Id.*, Cl. Ex. 2 at 5 (Dr. Egea's Dec. 15, 2010 IME report).

accidents to claimant, only one fall was identified. He didn't actually see claimant's slip and fall, but he did see him on the ground. Mr. Rodriguez asked claimant if he wanted to report the accident and claimant declined and continued working. Mr. Rodriguez suggested that the claimant contact a supervisor, but the claimant told him not to say anything.[6] He doesn't recall claimant going to the office to talk with Mr. Gadwood when they got back to the shop, but there was a time he didn't see claimant when they got back because claimant had some keys and a radio that he had to turn in.

Mr. Rodriguez testified that claimant complained about pain in his back after the accident and he again suggested that claimant report the accident. He testified that claimant didn't want to report it and claimed that he was still able to do the work.

Mr. Rodriguez testified that he too had a work injury in January, 2010, that he reported and was immediately provided with treatment. He testified that he was off work for a little while for his injury. On the day before he was to return, claimant called him and said that he was done, which he took to mean that the claimant quit his job. The next day, claimant was waiting for him at the front door of the building and said that he was hurt and asked Mr. Rodriguez to come to the office with him to talk with a supervisor.

Robert Hunter, an assistant manager with respondent, from January 2010 through November 2010, testified that he doesn't recall claimant ever reporting to him a work-related injury. He also denies claimant gave him anything in writing about an injury on the job.[7] Mr. Hunter did testify that the claimant came to him in November 2010, reporting that he was giving his two weeks notice because he couldn't do the job anymore as it was hard on his body. Mr. Hunter stated that he told claimant that he didn't want to lose a good driver, but he understood and offered to pay his last two weeks and thanked him for his service. Claimant confirmed that he would be paid for his last two weeks of work and then the two shook hands and claimant left. Claimant did not ask for any medical treatment at that time.

Joe Gadwood, a commercial manager for respondent, testified that his prior position with respondent was as a residential manager under the supervision of Robert Hunter and the other route supervisors. He testified claimant was under his supervision during the period of January 2010 through November 2010, but he denies the claimant came to him in January 2010 to report an accident or injury on the job. He testified that if an employee reports a work accident or injury they are referred to Tom Steck, who deals with workers compensation.

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[6] *Id.* at 47.

[7] *Id.* at 61.

Mr. Gadwood testified that the first he learned of claimant having a work injury was when claimant provided his two weeks notice on November 9, 2010.[8] He testified that the claimant told him that the winter before he had pulled a muscle in his back and because of his work it took a while to heal. Additionally, because he was getting old the work was becoming too physically demanding claimant had decided to quit. Claimant told him he could no longer physically perform the job and he was going to follow-up on another job prospect.

Mr. Gadwood testified that he offered to send claimant to Mr. Steck to make an injury report, but claimant declined, stating that the incident was last winter and not to worry about it. Claimant came back to see Mr. Gadwood that afternoon to confirm that he was giving his notice and leaving. Mr. Gadwood testified that the claimant seemed happy about the two weeks paid leave and shook hands on it and left. Nothing was put in claimant's file about a work injury because he quit his job and never formally reported an injury. When claimant was offered the chance to report the accident, he turned it down.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

K.S.A. 2009 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the

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[8] *Id.* at 75.

[9] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2009 Supp. 44-501(a).

> purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[12]

K.S.A. 2005 Supp. 44-508(d) states:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[13]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[14]

Claimant testified that he suffered personal injury by accident on January 13, 2010. The fact that he suffered a slip and fall while working for respondent is not disputed, but the date of that slip and fall is not clear from this record. Claimant advised the Galilee Chiropractic Office, and Dr. Andres that he fell on December 10, 2009.

Estevan Rodriguez, claimant's co-worker, acknowledges claimant suffered the slip and fall in the winter of 2010, but was unable to identify the exact date or the specific month. He did testify that the fall occurred before he, himself, suffered a work-related accident in January, 2010. He did not testify that claimant suffered two separate falls while working for respondent. Mr. Rodriguez acknowledged that claimant complained at times of ongoing pain while working. But there is no medical documentation in this record to support a claim of a series of accidents. Dr. Andres report of December 15, 2010,

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[12] K.S.A. 2009 Supp. 44-508(d).

[13] K.S.A. 2005 Supp. 44-508(d).

[14] K.S.A. 2009 Supp. 44-508(e).

identifies the date of accident as January 13, 2010. Dr. Andres does not offer an opinion that claimant's condition worsened as the result of his ongoing work for respondent. This record does not support a finding that claimant suffered a series of work-related accidents through his last day worked. The date of accident proven in this record is January 13, 2010.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[15] K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .[16]

Claimant testified he informed Mr. Gadwood of the accident on the date of the fall, however, Mr. Gadwood denies being told of an accident until November 2010. Additionally, Mr. Rodriguez testified that he advised claimant to talk to Mr. Gadwood or Mr. Hunter and claimant refused. This record does not support claimant's contention that he advised Mr. Gadwood of the accident immediately after the fall. Instead, the record supports a finding that claimant failed to advise respondent of the accident until November 2010. That is beyond the 10 day or 75 day limits set by K.S.A. 44-520. Therefore, claimant failed to provide timely notice of his accident.

Additionally, claimant failed to provide evidence that he provided timely written claim of the accident within the 200 days set forth in the statute.

A claimant's testimony alone is sufficient evidence of his own physical condition.[17] While it is true that a claimant's testimony alone is sufficient to prove a physical condition, it is also true that when the credibility of that testimony is disputed, the ALJ has an advantage being able to observe live witness testimony. The Board has, in the past, given deference to an ALJ's determination regarding credibility when observing that live testimony. Here, the ALJ had claimant and all three of respondent's witnesses in his courtroom. The question of whether claimant suffered a single accident or a series was determined contrary to claimant's testimony. It appears that the ALJ found claimant to be

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[15] K.S.A. 44-520.

[16] K.S.A. 44-520.

[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

less credible than respondent's other witnesses. This Board Member agrees. Claimant's testimony is not sufficiently persuasive to allow an award of benefits in this matter.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove a series of accidents in this matter. Claimant has proven that he suffered a single traumatic accident on January 13, 2010. Before an injury is compensable, that Kansas Workers Compensation Act requires notice and written claim be provided in a timely manner. Claimant has failed on both counts. The denial of benefits for failure to provide timely notice and timely written claim is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 11, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: C. Albert Herdoiza/Gary P. Kessler, Attorneys for Claimant
Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[18] K.S.A. 44-534a.